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IN THE

Supreme Court of the United States

October Term, 1945

No. 482

Estate of JEROME J. HANAUER, LEWIS L. STRAUSS and CARRIE H. HANAUER, Executors,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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POINT I

The Tax Court and the Circuit Court of Appeals have herein decided a federal question in a way probably in conflict with an applicable decision of this Court, namely, *Robinette v. Helvering*, 318 U. S. 184 (1943).

The position taken by respondent in the case at bar as evidenced by its brief in opposition collides not only with the Circuit Court of Appeals decisions discussed in the Petition but also with an applicable decision of this Court, namely *Robinette* v. *Helvering*, 318 U. S. 184 (1943).

The *Robinette* case involved the creation on the same day and at the same place by a mother and daughter of identical cross trusts. They were drawn up by the same attorney, "the family attorney." It was found that they had been executed pursuant to "an agreement" between mother, daughter and stepfather "with a view to keeping the daughter's fortune within the family" (at p. 185).

Thus, virtually every factor relied upon by respondent (and by both lower courts) herein to establish consideration was present in the *Robinette* case plus a finding that "an agreement was made" to create the trusts there involved. Nonetheless, this Court squarely rejected the "contention * * * that an agreement between the parties to execute these trusts was sufficient consideration to support the transfer" (at p. 187). The Court regarded the transaction as being donative in character and refused to accept the creation of one trust as being the consideration for the creation of the other.

The Circuit Court of Appeals for the Third Circuit took the same view of the transfers in the *Robinette* case as did this Court (129 F. (2d) 832, especially at p. 835).

Moreover, the Government itself, respondent herein, argued in its brief in this Court in the *Robinette* case that "the gifts were none the less real because of the concerted action with respect thereto" (Govt. Brief in *Robinette* v. *Helvering, supra,* at pp. 10 and 11). In this case, respondent puts forth a contrary contention. The essence of respondent's argument herein is that

> "This case presents only a question of fact, with respect to which the Tax Court's finding is conclusive, since it is supported by ample evidence. As has been many times held if the reciprocal trusts created by the decedent and his wife are in fact created in consideration of each other, there is no question that the decedent is to be treated for purposes of the estate tax as the grantor of the trust created by his wife" (Resp. Br., p. 8).

We do not quarrel with the contention that "if the reciprocal trusts created by the decedent and his wife were in fact created in consideration of each other" respondent should prevail. However, every factor adverted to by respondent herein as "ample evidence" to prove that the trusts were "created in consideration of each other" was present in the *Robinette* case plus the fact of agreement and still this Court rejected the argument that there "was sufficient consideration to support the transfer" (318 U. S., at 185).

It is clear from the decision of this Court in the *Robinette* case that respondent is in error when it maintains that the question of consideration *vel non* is "only a question of fact." Consideration is a legal concept. The ascertainment of the facts upon which a finding of consideration depends is a question of fact, but whether these factual circumstances taken together add up to what the law calls consideration is a " 'clear cut' question of law." See *Bingham* v. *Commissioner*, 65 Sup. Ct. 1232 (1945) and cases therein cited. It is immaterial that the *Robinette* case involved a gift tax liability while an estate tax is at issue here since the answer to a question of substantive law does not depend upon the statutory context in which it is asked.

This Court held in the *Robinette* case that as a matter of law all the factors relied upon by respondent in the instant case plus the fact of agreement were insufficient to establish consideration; that despite their presence, the transaction must be viewed as donative in character. It would seem to be obvious that the same factors minus the fact of agreement are insufficient as a matter of law to prove consideration in the case at bar. We submit that the contrary decisions of the courts below are "probably in conflict" with the applicable *Robinette* decision of this Court within the meaning of Rule 38 of subdivision 5(b) of the Rules of this Court.

POINT II

On the basis of respondent's own summary of the applicable law, which correctly states the decisions of the Second Circuit, other Circuit Courts of Appeals and the Tax Court in reciprocal trust cases, the holding of the Circuit Court of Appeals herein is inconsistent with such other decisions and is erroneous.

As pointed out *supra,* respondent argues that "if the reciprocal trusts created by the decedent and his wife were in fact created in consideration of each other, * * * the decedent is to be treated for purposes of the estate tax as the grantor of the trust created by his wife" (Resp. Br., p. 8). We do not quarrel with this statement of the law which correctly reflects the decisions (discussed in the Petition) of the Second Circuit as well as of other Circuits and of the Tax Court in reciprocal trust cases. By thus stating the applicable law, respondent acknowledges the necessity for a finding by the Court below that the trusts herein were "created in consideration of each other." But the Circuit Court of Appeals made no such finding. Instead it expressly cautioned against its holding being regarded as such a finding:

> "Nor should it [the holding of the Circuit Court of Appeals] be taken as an intimation that the evidence here could support a finding that the wife's transfer was effective to bring about the decedent's transfer—a finding not essential to support the result reached here" (R. 129-130).

Presumably, it was this failure to find a two-way flow that impelled the Court below to resort to its novel theory of "causation" to support the result reached by the Tax Court. We have pointed out in the Petition that in every other reciprocal trust case where the trust created by

one settlor was taxed to the estate of the other, there was a finding of mutual consideration, *i. e.*, that the trusts had been created in consideration of each other. The announced refusal of the Court below to make such a finding herein renders its decision inconsistent with all the others in the field and erroneous under the rule of law invoked by respondent itself.

POINT III

The writ prayed for should be granted.

Respectfully submitted,

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